

Guest editorial

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The Care Act 2014: a new legal framework for safeguarding adults in civil society

Many of us may be able to remember the general air of excitement that surrounded the writing and publishing of “No Secrets” (Department of Health, 2000) and “In Safe Hands” (Welsh Assembly Government, 2000), although we might wish we were young enough not to! At the time, the documents generated mixed feelings amongst service users/customers and carers as well as professionals/practitioners. To some they were a major step forward on the road to raise the status of “vulnerable adult protection” (as it was then known) closer to that already enjoyed by child protection and domestic violence; to others it was a missed opportunity to go even further along that road; and to a small number it was a step too far when the perception was that existing legislation provided sufficient protection and any increased powers amounted to state intrusion into the private lives of adults.

The constitutional situation across the four countries of the UK meant that England and Wales had slightly different structures put in place to respond to situations of abuse and neglect, while Scotland and Northern Ireland were responsible for their own processes and took different approaches. Even within England and Wales, “No Secrets” and “In Safe Hands” were issued as guidance to Local Authorities under existing legislation and, as such, did not place any requirements on any other agencies or organisations to cooperate with the Local Authority. In fact, it could be argued that Local Authorities did not have to act in accordance with guidance if they could see good reason why not. Indicative of the anomalous position of the guidance is the situation in England regarding the requirement of Local Authorities to produce multi-agency policies and procedures to protect vulnerable adults – it is interesting to note how they had to produce multi-agency policies and procedures, but no other agency was required to work with them to do so!

“No Secrets” was published in March 2000 and required the above-mentioned policies and procedures to be forwarded to the Department of Health by October 2001. When one of us (PM) took up the post of Vulnerable Adult Protection Coordinator with Coventry City Council in mid-2003, he discovered that the Council had not submitted its policy and procedure to the Department and that in fact the Council had not even finalised them. When he advised the Department of Health of this, they did not seem unduly surprised or bothered and when he did submit them later that year their receipt was not acknowledged; when he chased the Department six months later to confirm that they had received them and to ask for feedback on them, he was told they had received them, and, if they have had any negative comments to make, they would have been in contact. Not really what you would want or expect if the Department and the government were really committed to making vulnerable adult protection a reality and to have a real impact on the lives of vulnerable adults and the services designed and intended to protect them. However, given that both “No Secrets” and “In Safe Hands” were launched with no key performance indicators and were announced as being “cost-neutral” perhaps we should not have been surprised.

As suggested above, “No Secrets” was subject to criticism from the time of its launch; in itself, this is hardly surprising. No piece of legislation, let alone statutory guidance, is going to command a 100 per cent support across a range of constituencies covering service users, carers, professions, agencies, organisations and sectors. “No Secrets” came under fire from most if not all the above for a number of reasons including:

- the terminology of “vulnerable adults” was considered by some if not many to be discriminatory and labelling of the very people it was trying to empower by making it appear that they were some way the cause of their being abused and neglected;

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- the definition of “a vulnerable adult” was interpreted by some Local Authorities to require the adult to be in receipt of community care services to meet it;
- the definition of “abuse” was seen as too vague and open to interpretation, being based as it was on the violation of the individual’s human rights rather than specific acts;
- a definition of “abuse” that is based on the violation of someone’s human rights by another person or persons does not enable the protection of those who self-neglect, a particular issue before and subsequent to the implementation of the Mental Capacity Act 2005;
- there was no duty on anybody to act under the multi-agency policies and procedures – there was not even a date when they had to be implemented, only returned to the Department of Health, a date that was not enforced;
- not only was there no duty to act, but if the Local Authority, which invariably meant the local Adult Social Services Department, wanted to do so, it had no or few powers under which it could intervene; and
- “Vulnerable adult protection” was seen by other agencies, particularly health organisations and, to a lesser extent, the Police, as the task of Social Services and, having made a referral, they would often withdraw involvement.

We are not saying that the above are all true or correct, but they are accurate reflections of perceptions and criticisms of “No Secrets” in the early 2000s. There was a groundswell amongst professionals directly involved with “vulnerable adults” and the organisations and agencies established to support and campaign on their behalf that was lobbying Ministers and the Department of Health to review “No Secrets” with a view to revising it to make it more effective. What followed was not a review of “No Secrets” but a consultation on a review of “No Secrets”, perhaps reflective of the lack of political will at that time to tackle the issue.

The Consultation on a Review of “No Secrets” was held in 2008/2009, with a response from the government in early 2010 that said it would establish an Inter-Departmental Ministerial Group, introduce legislation to put Safeguarding Adults Boards (SABs) on a statutory basis and issue multi-agency practice guidance. Before this could all happen, a General Election led to a change of government, with the newly-elected Coalition deciding to scrap its predecessor’s proposals in favour of a review of the chaotic plethora of legislation supporting – or not – adult social care that would propose a simplified legislative structure that would incorporate safeguarding within it. While frustrating in many ways, from a purely safeguarding perspective, which would otherwise continue to be under-valued, under-resourced and under-powered, this did make a lot of sense and was seen as likely to produce a more coherent base for work in safeguarding adults in the long run.

The Care and Support Bill was published in 2011, based very much on the recommendations of the Law Commission’s review of adult social care legislation, which took place between 2008 and 2011. This proceeded through a consultation process of its own, in the process of which it became the Care Bill and then the Care Act, receiving Royal Assent in May 2014 and coming into effect, in part, in April 2015. Statutory guidance was developed to support the implementation of the Act. The first edition of this was published in October 2014 by the Department of Health, barely six months after the Royal Assent; perhaps not surprisingly, the second edition was published in March 2016. The second edition was necessary to cover some aspects of the Care Act, which appeared to have been “shelved” by the government, some that were decided to be unwise and some that were considered necessary to be added. All of this is somewhat redolent of a piece of statutory guidance that was rushed and not properly thought through.

The Act, of course, only applies to England; Scotland already had its own legislation relating to adult protection, Wales had developed its own, which had important similarities as well as differences to the Care Act 2014 and Northern Ireland had not decided whether to introduce new legislation or not. This seemingly anarchic situation across the UK did, and still does, provide an opportunity for a research project that examines the processes by which the Care Act came to

take the form it did and to compare it, and how it is implemented, with the legislation, or lack of it, in the other three countries.

In terms of adult safeguarding, the Care Act 2014 did contain framework legislation that placed SABs on a statutory footing. It required SABs to publish annual reports and strategic plans. Under certain circumstances it placed a duty on SABs to commission Safeguarding Adults Reviews (SARs), which replaced Serious Case Reviews (SCRs), with discretion to commission SARs in other circumstances. SABs were to have three statutory members, the Local Authority, Clinical Commissioning Group and Police, with discretion then as to how wide and inclusive the remaining Board membership was drawn. SABs were given the power to request information and Local Authorities the duty to conduct safeguarding enquiries. The adult safeguarding provisions were part of a general requirement in the Care Act 2014 to promote people's wellbeing, with agencies being under a statutory duty to cooperate both at strategic and operational levels.

The Care Act 2014 did not follow Scottish legislation (the Adult Support and Protection (Scotland) Act 2007) in that no new protection orders were created; nor, despite strong advocacy, was an adult safeguarding power of entry created. Wales has similarly eschewed protection orders but has created an adult safeguarding power of entry in their Social Services and Well-being (Wales) Act 2014. Perhaps less well known, but nonetheless significant, is the fact that the Care Act 2014 has not given SABs the power to require statutory and other partners to contribute to resourcing its activities; nor do SABs have effective sanctions if agencies do not cooperate in terms of its adult safeguarding responsibilities at local level.

Subsequent developments have also shown some equivocation. Self-neglect was included in adult safeguarding arrangements for the first time in England in the Care Act 2014, but in key respects the second edition of the statutory guidance (Department of Health, 2016) demonstrates some unease by appearing to limit the occasions when a safeguarding enquiry might be triggered in self-neglect cases. This example, and the failure to legislate for either an adult safeguarding power of entry or protection orders, arguably demonstrates ongoing unease with giving the state powers to intervene, despite evidence of the effectiveness of the Scottish adult protection system (see e.g. Preston-Shoot and Cornish, 2014). It is therefore important to recognise that the Care Act 2014 was a compromise, that there is nothing inevitable about the legal rules that were developed, and that they are the result of how competing perspectives, and arguably interests, are ultimately in some form reconciled.

Going forward, it becomes imperative to evaluate the different legislative and policy arrangements, and the four nations of the UK provide a perfect case study for research in that respect. It becomes equally imperative to look at outcomes from the perspectives of practitioners, service users and carers, especially because the statutory guidance (Department of Health, 2016) places great emphasis on Making Safeguarding Personal, which requires a major culture shift in how health and social care agencies in particular have historically delivered adult safeguarding services. Some legislation is hard for practitioners and their organisations to understand, whilst some is experienced as hard to implement. The Data Protection Act 1998 and the Mental Capacity Act 2005 are two cases in point. What, one wonders, might practitioners and managers, across health and social care agencies and beyond, say about the Care Act 2014? SARs, and their predecessor SCRs, also highlight that legal literacy and safeguarding literacy across professions and agencies is variable (Braye *et al.*, 2015), reinforcing again the need to track the experience of implementation of the provision of the Care Act 2014.

In 2015, a multi-disciplinary research team obtained funding from the Economic and Social Research Council to run a seminar series to consolidate and advance knowledge around safeguarding adults under the new legislative and policy framework. The research team comprises the following people: Alison Brammer, Keele University (Principal Investigator); Pete Morgan, Independent Consultant and the University of Warwick; Paul Kingston, University of Chester; Jonathan Parker, Bournemouth University; Bridget Penhale, University of East Anglia (Norwich), Michael Preston-Shoot, University of Bedfordshire and Alex Ruck-Keene, Barrister (39 Essex Chambers, London) and the University of Manchester.

The series aims to explore how the new law emerged through a policy process, the challenges of interpretation that emerge and how practitioners and their organisations can be supported to deliver the intentions and requirements of the Care Act 2014 and to keep people safe from abuse and harm.

Key objectives are that the seminar series will:

1. theorise the process of law reform, exploring the interplay in making law between research and practice evidence, policy advocacy and political debate;
2. evaluate the new landscape for adult safeguarding, for example, the contested inclusion of self-neglect and the omission in England of a power of entry, and to appreciate the challenges in interpreting and implementing the new powers and duties;
3. examine accountability and responsibility to and for safeguarding adults in civil society;
4. develop the evidence-base for learning adult safeguarding law that instills an ethical, social justice commitment alongside technical legal knowledge;
5. establish an inter-disciplinary network uniting academic and practitioner perspectives, health and adult social care providers with civil society organisations providing welfare services, to assist with interpreting, learning and evaluating the new provisions; and
6. effectively disseminate work undertaken in seminars to academic, practitioner, service user and carer audiences.

To achieve the objectives, the seminar structure was devised to develop three distinct themes. The focus in year one was on how law is made, reflecting on contributions of researchers, civil society organisations, pressure and advocacy groups, statutory health and welfare agencies, and judicial decision making, including a comparative perspective. The focus in second year, currently underway, is on interpreting the law, including new concepts, such as Making Safeguarding Personal, dignity and wellbeing, and new accountabilities. The third and final year of the series will focus on learning law. How might new adult safeguarding powers and duties be taught and what can be learned from SARs, case law and investigations by the Local Government and the Health Services Ombudsman. Each theme is examined from academic, service user, statutory and third-sector organisation perspectives.

Seminar participants

The series aims to create a strong network of individuals and organisations concerned with adult safeguarding and with the capacity to engage in further collaborative research, policy and practice development, and conferences. Over the first year, seminars were held at Keele University, Bournemouth University and the University of Bedfordshire. Each seminar has been well attended with in the region of 40-60 delegates. The series to date has been truly multi-disciplinary with an impressive range of organisations and disciplines represented including the Department of Health, Local Authorities, Police authorities, health authorities, Association of Directors of Adult Social Services, Care Quality Commission, Civil society and third-sector organisations concerned with social and welfare services including Action on Elder Abuse, ASIST and Alternative Futures, Social Care Institute for Excellence, academics and educators, training and consultancy organisations and solicitors and barristers.

An open access dedicated website has been developed to support the series and can be found at: <https://safeguardingadults.wordpress.com>

The site includes presentations from the seminars, in video and print form, a discussion forum, and a live Twitter feed. Summaries of key issues from each of the seminars, links to publication outputs from the seminars and to other key works in the field of safeguarding and suggested pre-reading also appear on the site. Contact information about the seminar network and announcements about the seminar programme and other related events are also posted. The website also provides a forum for collating views expressed by members on any consultation documents of relevance to adult safeguarding. In addition the site hosts blogs during the life of the seminar series, and these are likely to continue beyond the series completion date.

Places at seminars may be reserved by e-mail to law.safeguardingadults@keele.ac.uk. Any queries about the series should also be directed to this e-mail address. At the seminars themselves and in between seminars, there is an active Twitter feed @SALLY2016_18 #SafeguardingAdults.

We are delighted that this special issue of the journal provides a compilation of four papers based on presentations given at one of the seminars that took place in 2016, together with an additional legal paper (more on that later). The theme for the seminar was safeguarding in the devolved nations, so we are delighted to have papers from each of the devolved nations; the papers are as follows.

Our first paper is by John Williams, of Aberystwyth University and the focus is on Wales. The paper explores recent changes to adult safeguarding in Wales (including background information) that have been introduced as part of the Social Services and Well-being (Wales) Act 2014 and discusses their potential impact. Although the Act introduced a number of changes in adult safeguarding in Wales, not least the duty to make enquiries, statutory powers of barring and removal were not included. As a recently implemented statute, the legislation is still in the process of becoming established and care and health practitioners are becoming used to the changes required by the legislation. Although no official data on the impact of the new legislation are available yet, it is likely that the lower threshold that has been set for referrals will mean an increase in caseloads and the need for practitioners to react to both low- and high-risk cases. The paper provides a detailed examination of the provisions of the Act that are related to safeguarding and identifies that more research and evaluation of the different approaches to safeguarding across the UK are needed.

The second paper in the issue is from Scotland, which has had legislation in the form of the Adult Support and Protection (Scotland) Act since 2007, implemented from 2008. In this paper, Kathryn Mackay of the University of Stirling, together with colleague Mary Notman explore the potential value of having a specific, separate statute on adult safeguarding. The paper details the powers and duties mandated by the Act and relate these to the overall context of the broader Scottish legislative framework in relation to adult protection. The authors utilise a case study of one specific Local Authority in Scotland to explore the merits of and issues raised by the Act; this is achieved through consideration of the different forms of data contained in the annual reports on adult protection activity produced by the authority. From the data obtained, the use of Protection Orders is quite limited – as intended within the Act. It also appears that effective identification; investigations and interventions require staff to be skilled, knowledgeable and well supported. However, a lack of reports and data at national level means that comparison between the local and national data is quite limited. The paper provides an appraisal of the implementation of the legislation in recent years and considers developments that have taken place in both England and Wales. A need for comparative research across the different nations of the UK is highlighted.

The following paper in the issue is by Lorna Montgomery of Queen's University, Belfast and her colleague Joyce McKee. The paper examines the current model of adult safeguarding in Northern Ireland. The distinctive features of Northern Irish society have shaped its adult safeguarding policy and practice in ways which differ from those in England, Scotland and Wales and the paper provides an analysis of adult safeguarding, legislation, policy and practice in this context. Usefully, the paper also includes insights from the Regional Adult Safeguarding Officer for Northern Ireland (McKee). A number of strengths, limitations and challenges of Northern Irish legal and policy frameworks, and practice systems in relation to safeguarding are discussed. This includes an emphasis on changes in the way that adult safeguarding has been conceptualised, together with a focus on prevention and early intervention activities. It appears that organisations from community, voluntary and faith sectors have important roles in the continuing development of policy and practice in Northern Ireland.

The fourth paper in this issue is by Adi Cooper and Claire Bruin from England. It is now two years since the implementation of the Care Act (2014) in April 2015, and this paper explores the impacts of the Act on adult safeguarding partnerships and practice. The paper considers a range of areas, including wellbeing and safety, safeguarding activity and process, changing criteria and definitions, Making Safeguarding Personal, SABs, SARs, and advocacy. The authors, an Independent Chair of two SABs, and a Senior Manager in adult social care in a Local Authority, present information from published sources, experience and networks in the professional sphere. The paper argues that the

impact on adult safeguarding and SABs has been greater than originally envisaged in a range of areas. This appears to be as a result of aspects of adult safeguarding having been given statutory status in the Act, and a new framework put in place. The authors consider that this provision has resulted in added impetus to cultural change in adult safeguarding practice.

The final paper in this issue is by Tim Spencer-Lane of the Law Commission. Some readers of the journal of long-standing will be aware that there have been previous papers from Tim (on behalf of the Law Commission) in the journal in relation to legal and regulatory reforms that have a bearing on safeguarding. Examples of these are the Regulation of Health and Care Professions (Spencer-Lane, 2012) and the reform of the law relating to Adult Social Care (Spencer-Lane, 2010, 2011), which culminated in the Care Act 2014. This current paper, written following the recent consultation exercise and work by the Law Commission on potential reform of the Deprivation of Liberty Safeguards, provides an overview of the Law Commission's final report and recommendations on the reform of the Deprivation of Liberty Safeguards under the Mental Capacity Act, together with some discussion of implications.

We hope that this issue has provided information and food for thought for readers and will stimulate both discussion and potentially, practice development. We also hope that it will stimulate some interest in the seminar series and that some readers will be able to attend future seminars and join in the ongoing discussion and debates relating to safeguarding and legal literacy.

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